

TRANSCRIBED FROM DIGITAL RECORDING

THE IN UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,

Plaintiff,

-vs-

EQUITYBUILD, INC., EQUITYBUILD
FINANCE, LLC, JEROME H. COHEN,
AND SHAUN D. COHEN,

Defendant.

Docket No. 18 C 5587

Chicago, Illinois
July 2, 2019
11:00 AM

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE YOUNG B. KIM, MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: U.S. SECURITIES & EXCHANGE COMMISSION
BY: MR. BENJAMIN J. HANAUER
175 W. Jackson Blvd., Suite 900
Chicago, IL 60604

For the Receiver: RACHLIS, DUFF, PEEL & KAPLAN, LLC
BY: MR. MICHAEL RACHLIS
542 South Dearborn, Suite 900
Chicago, Illinois 60605

****PLEASE NOTIFY OF INCORRECT SPEAKER IDENTIFICATION****
NOTE: FAILURE TO STAND NEAR THE MICROPHONE MAKES
PORTIONS UNINTELLIGIBLE AND INAUDIBLE

Transcriber:

SANDRA M. MULLIN, CSR, RPR, RMR, FCRR
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 2260
Chicago, Illinois 60604
Telephone: (312) 554-8244
Sandra_Mullin@ilnd.uscourts.gov

1 APPEARANCES: (Continued)

2 For USB AG: PLUNKETT COONEY, PC
3 BY: MS. JENNIFER WALKER
4 221 North LaSalle Street, Suite 1550
5 Chicago, Illinois 60601

6 For Citibank, U.S. Bank,
7 Wilmington Trust, and
8 Fannie Mae: FOLEY & LARDNER
9 BY: MR. ANDREW T. McCLAIN
10 321 North Clark Street, Suite 2800
11 Chicago, Illinois 60654

12 For Midland Loan Svcs.: AKERMAN, LLP
13 BY: MR. THOMAS B. FULLERTON
14 71 South Wacker Drive, 47th Floor
15 Chicago, Illinois 60606

16 For BC57: HONIGMAN LLP
17 BY: MR. SCOTT B. KITEI
18 660 Woodward Avenue
19 2290 First National Building
20 Detroit, Michigan 48226-3506

21 For Freddie Mac: PILGRIM CHRISTAKIS LLP
22 BY: MR. JEFFREY D. PILGRIM
23 321 North Clark Street, 26th Floor
24 Chicago, Illinois 60654

25 For Liberty EBCP: JAFFE, RAITT, HEUER & WEISS
BY: MR. JAY L. WELFORD
27777 Franklin Road
Southfield, Michigan 48034

Also Present: MR. KEVIN B. DUFF, Receiver

1 (Proceedings heard in open court:)

2 THE CLERK: 18 CV 5587, United States Securities and
3 Exchange Commission versus Equitybuild, Inc., et al.

4 THE COURT: Good morning.

5 MR. RACHLIS: Good morning, your Honor. Michael
6 Rachlis on behalf of the receiver. With me is Kevin Duff.

7 MR. DUFF: Good morning, your Honor.

8 MR. HANAUER: Good morning, your Honor. Ben Hanauer
9 for the SEC.

10 MR. McCLAIN: Good morning, your Honor. Andrew
11 McClain on behalf of six different lenders. US Bank as Trustee
12 for the registered holders of certificate series ending
13 2017-SB30, 2017-SB41 and 2018-SB50. Citibank, as trustee for
14 the series ending 2018-SB48. Wilmington Trust as trustee for
15 the series ending 2014-LC16, and Fannie Mae.

16 THE COURT: I'm sorry, your name again?

17 (Laughter.)

18 MR. McCLAIN: That was a mouthful. Andrew McClain.

19 THE COURT: Give me one second. I see you here.

20 MR. WELFORD: Good morning. Jay Welford appearing on
21 behalf of Liberty EBCP LLC.

22 MR. PILGRIM: Jeff Pilgrim on behalf of Freddie Mac.

23 MR. FULLERTON: Good morning, your Honor. Tom
24 Fullerton on behalf of Midland Loan Services.

25 MR. KITEI: Good morning, your Honor. Scott Kitei on

1 behalf of BC57.

2 MS. WALKER: And good morning, your Honor. Jennifer
3 Walker for UBS AG.

4 THE COURT: Okay. I did read over the consolidated
5 motion to amend May 2, 2019, memorandum of opinion and order.
6 Although the movants are not seeking this particular relief, if
7 the court were to accept all these restrictions or amendments,
8 essentially what has to happen is for the entire process to be
9 adjudicated. In other words, the court would have to say who
10 is owed what before any property can be sold. Would that be
11 fair to say?

12 MR. McCLAIN: That's correct, your Honor.

13 THE COURT: But this is the first time that the
14 movants are bringing up this issue. Would that be fair also?

15 MR. McCLAIN: No, that's not fair, your Honor.

16 THE COURT: Why is that?

17 MR. McCLAIN: Because we've been discussing this
18 issue since the onset of the case, that we need a priority
19 determination for each property. We filed several months ago a
20 motion for expedited hearing and priority determination to kind
21 of catch this at the head to avoid where we are right now. But
22 we do think that this is very ripe at this point because
23 yesterday was the claims-barred date. So all claims should
24 have been submitted for all these properties. So the receiver
25 should have in his possession all information related to these

1 properties and should be able to determine who has priority and
2 the amounts of each claim.

3 THE COURT: And just so we're clear, the movants, the
4 creditors, do not have to exercise their right to submit a
5 credit bid; correct?

6 MR. McCLAIN: We do not. We're not formally required
7 to do it, your Honor. But as part of our security interest, we
8 have the right to do it and we have the right --

9 THE COURT: I understand that you have a right. But
10 no one is forcing the creditors to do so.

11 MR. McCLAIN: No one is forcing the creditors, your
12 Honor. But the May 2nd order grants us the right, or security
13 interests grants us the right, Illinois law grants us the
14 right. And to be able to fully protect our security interests,
15 we should be entitled to credit bid.

16 THE COURT: I understand all that. But you don't
17 have to do so; right?

18 MR. McCLAIN: We do not have to do so, but, to
19 protect our interests, if the process plays out as it's
20 required, we would exercise our right to credit bid.

21 THE COURT: And do you think that the courts should
22 only be sensitive to the creditors' rights?

23 MR. McCLAIN: No, your Honor. And I'm glad you
24 brought that up because the creditors are on the same footing
25 as all these Equitybuild investors. And the reason being is

1 that we were duped just like the Equitybuild investors. For
2 some reason, at the onset of this case, the receiver is taking
3 the position that the creditors are the bad guys. But we've
4 been just as much impaired and injured by the clients'
5 actions --

6 THE COURT: Well, let me stop you there. Let me stop
7 you. When the creditors were asking to modify the sealed bid
8 process in order for the creditors to exercise credit bid, and
9 you also say that you guys -- the creditors are on the same
10 footing as the Equitybuild investors. But if I had allowed the
11 credit bid to move forward, as if this was a foreclosure action
12 and if the credit bid was accepted as the highest bid, the
13 creditor would actually take that asset.

14 MR. McCLAIN: Well --

15 THE COURT: Without any challenge whatsoever.

16 MR. McCLAIN: No, your Honor, because --

17 THE COURT: Why is that?

18 MR. McCLAIN: Because if --

19 THE COURT: What would happen? How would the other
20 investors get any piece of that property if the credit bid was,
21 in fact, the highest bid?

22 MR. McCLAIN: Because it's based on your right to
23 credit it. So let's assume that one property has a creditor's
24 mortgage on it and an Equitybuild investor's mortgage on it.
25 The court would determine which of those mortgagees is first in

1 priority and which is second in priority.

2 So let's just assume a lender has a \$2 million
3 mortgage and an Equitybuild investor has a \$1 million mortgage.
4 If we are determined to be senior lienholder above the
5 Equitybuild investor, then, yes, we have the right to credit it
6 up to \$2 million of our debt. But if it was reversed, the
7 Equitybuild investor was determined to be senior, we were
8 determined to be junior, then the Equitybuild investor would be
9 entitled to credit bid their \$1 million debt. If we wanted to
10 also bid, what we would have to do is buy out the Equitybuild
11 investor, so they would be paid in full, and then we would step
12 into the senior position, and then we could credit bid the
13 remaining part of our debt.

14 So the Equitybuild investors have just as much right
15 if they have a valid lien and debt owed to credit bid as much
16 as we do. And that's why we're asking that priority be
17 determined at this point.

18 THE COURT: I see. And this brings me back to my
19 other question, why this wasn't brought up before.

20 MR. McCLAIN: It was brought up before, your Honor.
21 We did file a motion for expedited discovery and priority
22 determination.

23 THE COURT: In the context of trying to approve the
24 sealed bid process this was brought up?

25 MR. McCLAIN: Yes, it was, your Honor. It was -- it

1 was in our objection, and then we filed a motion for expedited
2 discovery and evidentiary hearing. And we -- we made the exact
3 same arguments, stating that this is not -- we're not trying to
4 jump ahead anyone else here. All we're trying do is lay out
5 the facts to show who has priority, what the priority status
6 is, who is owed what, and then we can figure out who is
7 entitled to bid, how much they're entitled to bid. We've never
8 been trying to jump ahead any Equitybuild investors here to the
9 detriment of anyone other -- any other parties because we're
10 all on the same footing here.

11 THE COURT: So the court missed the argument of the
12 creditors, that no sale should take place before adjudication
13 of all issues regarding priority and what amount is owed to
14 each investor.

15 MR. McCLAIN: We -- we did ask for that relief, your
16 Honor, and it was denied. And then the sealed bid process was
17 approved, and then the claims process was also approved.

18 THE COURT: So that particular argument was made in
19 response to a motion to approve a sealed bid process?

20 MR. McCLAIN: I believe -- was it a sealed bid
21 process, or was it the -- or was it the claims procedures?

22 THE COURT: You don't know?

23 MR. McCLAIN: Actually, your Honor, if you just give
24 me a second, I do have the filing date.

25 So, your Honor, I misspoke. On March 13th, we filed

1 a response for the motion for entry of order establishing
2 claims-barred date. And then we also filed a cross motion to
3 discovery --

4 THE COURT: I'm sorry, March 13, 2019?

5 MR. McCLAIN: Correct.

6 THE COURT: Okay.

7 MR. McCLAIN: And it's Docket 285.

8 THE COURT: Okay. This is something filed with Judge
9 Lee or myself?

10 MR. McCLAIN: This appears to be before Judge Lee.

11 THE COURT: Okay. Go on.

12 MR. McCLAIN: And as part of that filing, we filed a
13 cross motion to set discovery schedule and hearing on lead
14 priority on an expedited basis and for related relief. And,
15 yes, your Honor, in that filing we made a similar request as
16 we're doing now, that priority be determined at that point.

17 THE COURT: And what was the ruling on your request
18 for priority determination?

19 MR. HANAUER: I can assist, your Honor.

20 THE COURT: Please, let me --

21 MR. McCLAIN: The court entered a minute order on
22 May 1st, indicating that it will not address our request in
23 Motion 285 because it approved the claims process and set the
24 deadlines for the claim process schedule.

25 THE COURT: Meaning the request was denied.

1 MR. McCLAIN: Effectively, yes.

2 THE COURT: Why do you bring it up again?

3 MR. McCLAIN: Because, your Honor, they're trying --

4 THE COURT: Why are you bringing it up again? I
5 don't understand this. It sounds to me like you made a request
6 in a timely fashion and Judge Lee denied the request.

7 MR. McCLAIN: Your Honor, we're bringing it up now
8 because the May 2nd order grants us the right to credit bid.
9 That order is effectively elusory because we do not have the
10 right to credit bid right now. Because Illinois law requires,
11 to effectively make a credit bid, you need two main facts:
12 One, you need a judicially determined amount of debt. And,
13 two, you need to know priority on the property. You need to
14 know the amount of your debt because that sets the amount that
15 you can credit bid. So let's take an example. If one --

16 THE COURT: No, I don't -- we don't need to take an
17 example. This is not an ideal situation. This is not a
18 foreclosure situation. Creditor is not controlling the
19 process. We are doing what we can to balance the interest of
20 everyone involved. Like you said, creditors are on the same
21 footing as the other Equitybuild investors. When we have that
22 situation, we can't do something that is going to give all the
23 rights to one party over the other. And, in my opinion, when I
24 looked at the argument that the creditor should be allowed to
25 submit a credit bid, I had to then balance the interests of the

1 investors. And in a situation where we don't have priority
2 determination, what are you to do at this point? If there is
3 no priority determination and the court has already -- already
4 ruled that we're not going to do at this point, what do you do
5 in order to protect the interests of all investors?

6 MR. McCLAIN: Then you have a determination of
7 priority, your Honor, because the reason --

8 THE COURT: We're going in circles here. That
9 request has been denied.

10 MR. McCLAIN: It has been denied in a different
11 scenario. The reason we brought it right now is because
12 Illinois law mandates this. I'm not talking about in a
13 foreclosure action solely. To credit bid you must --

14 THE COURT: So let me stop you. Illinois law
15 mandates such a judgment and finding in this context?

16 MR. McCLAIN: To credit bid, you need to know the --

17 THE COURT: No, no, please.

18 MR. McCLAIN: -- amount of your judicial --

19 THE COURT: That was a simple question. Illinois
20 law, you said, mandates such finding in this scenario, in this
21 context?

22 MR. McCLAIN: Your Honor, I was not --

23 THE COURT: Yes or no?

24 MR. McCLAIN: No, there is not a case directly on
25 point.

1 THE COURT: Why are you arguing it, then?

2 MR. McCLAIN: Because to have a credit bid -- your
3 Honor, if --

4 THE COURT: Again, you're repeating yourself.

5 MR. McCLAIN: -- we credit bid, we are --

6 THE COURT: You are repeating yourself.

7 MR. McCLAIN: We are not -- we are assuming the risk
8 by credit bidding because we don't know how much --

9 THE COURT: Exactly. You are assuming the risk.

10 MR. McCLAIN: But that's --

11 THE COURT: You want to exercise the right, you do
12 assume the risk because there are other investors' interests at
13 play. We are in a situation where the court has already denied
14 a request that we're not going to do priority determination.
15 It's not up to me to decide that. That's law of the case;
16 right? Would you agree with me that that's the law of the
17 case?

18 MR. McCLAIN: In relation to the claims process, yes.
19 In relation to the May 2nd order, no, I would say that it is
20 not. And the reason being is this court has held several times
21 in various instances that neither it --

22 THE COURT: Stop. Please, stop. The only reason why
23 that that is because it wasn't going to trump anyone else's
24 interests, you know? For instance -- and the part -- the
25 creditors like to point out that I entered an order or ruling

1 segregating the funds for each property. But that wasn't
2 inconsistent with the interests of the Equitybuild investors.
3 Would you agree with me on that point?

4 MR. McCLAIN: I -- I do agree with you on that point.
5 And I don't think that we're asking for any relief that is
6 inconsistent with any Equitybuild investors' rights. In fact,
7 the credit bid process, the way it's set up right now, is
8 actually hindering the lender's pre-existing state law security
9 interest. And this court has held, and there is Illinois case
10 law on that point, that we cannot -- the court, neither the
11 receiver, can modify or effect the pre-existing state law
12 interest of the lender. And by not determining our debt amount
13 and by not determining priority, you're shifting the risk to
14 the lenders to assume the risk that we might get into an
15 overbid situation, or we might be a junior lienholder that then
16 has to satisfy a senior lienholder. So you are affecting our
17 pre-existing security interests in these properties.

18 And what we're trying to do is lay it all out on the
19 table, make sure everyone is aware, the claims-barred date has
20 passed. So anyone who has a security interest in these
21 properties has already filed a claim. And we are just asking
22 that the court first figure out each property's debt and
23 priority before there is a sale process. Before each one of
24 these properties is sold. That's all we're asking for at this
25 point, your Honor. We're not trying to --

1 THE COURT: So if I agree with your position and I
2 said, oh, we need to have priority determination, how is that
3 not inconsistent with Judge Lee's prior ruling that there isn't
4 going to be a priority determination?

5 MR. McCLAIN: Because that was in relation to the
6 claims process. This is solely in relation to the credit bid
7 May 2nd order.

8 THE COURT: Do you think -- do you think that
9 priority determination that this court orders isn't going to be
10 the same priority determination that's going to be required in
11 this particular case in a claims process? It's going to be the
12 same thing. Would you agree with me?

13 MR. McCLAIN: The priority determination that --

14 THE COURT: It doesn't matter which context --

15 MR. McCLAIN: -- we're requesting now versus --

16 THE COURT: -- it's in.

17 MR. McCLAIN: -- versus what, I guess, falls out in
18 the claims process?

19 THE COURT: Yes.

20 MR. McCLAIN: Yes, it will be the exact thing.

21 THE COURT: It's going to be the same thing.

22 MR. McCLAIN: So then we would ask that the sales not
23 go forward until we determine priority and amounts owed.

24 THE COURT: Again, why wasn't this raised before in
25 responding to the motions for approval of the sealed bid

1 process?

2 MR. McCLAIN: This May 2nd order is in response to
3 our objection to the receiver's second sealed bid process
4 motion. So it was raised again in that instance, and that's
5 why the court granted our objection. Our
6 objection contained --

7 THE COURT: So -- so I missed the argument of the
8 creditors that the sealed bid process should not continue
9 because we need to have priority determination.

10 MR. McCLAIN: Yes, that's what we're asking.

11 THE COURT: No, no, no. I missed your argument, the
12 creditors' argument, that the sealed bid process should not go
13 forward because we need priority determination. You argued
14 that point; did you not?

15 MR. McCLAIN: I believe that point was argued, your
16 Honor.

17 THE COURT: Okay. Where?

18 MR. McCLAIN: It was most likely argued at the
19 hearing for that objection.

20 THE COURT: Hearing in this courtroom?

21 MR. McCLAIN: I believe so.

22 THE COURT: You believe that based on what?

23 MR. McCLAIN: Based on the -- the position that we're
24 taking right now, is that this needs to occur.

25 THE COURT: So this was the second request for

1 approval of a sealed bid process; right?

2 MR. McCLAIN: The May 2nd order was in response to
3 the receiver's second motion.

4 THE COURT: No, no, no. I'm just trying to follow
5 your argument. You said this argument was made in response to
6 the motion for second approval of sealed bid process; right?

7 MR. McCLAIN: I'm actually just reviewing the
8 objection right now, your Honor.

9 THE COURT: Objection to?

10 MR. McCLAIN: The -- the second motion for sealed bid
11 process.

12 THE COURT: Objection filed with this court?

13 MR. McCLAIN: It's Docket 235, your Honor. I don't
14 know which court it was --

15 THE COURT: 235? That seems to be pretty old; right?

16 MR. McCLAIN: It was February 19th.

17 THE COURT: February 19th. Was I even on the case in
18 February?

19 MR. HANAUER: Yes, your Honor.

20 THE COURT: Okay. And this 235 is the objection to
21 the receiver's motion for approval of a sealed bid process.

22 MR. McCLAIN: Correct. It's objections to receiver's
23 second motion for court approval of the process for public sale
24 of real property by sealed bid.

25 THE COURT: Okay. I will review it.

1 Let me turn to the receiver, Mr. Rachlis. What is so
2 wrong with getting everyone's rights determined before any
3 assets are sold? In other words, why is this so necessary now
4 to sell these assets? Why can't we wait? Why can't the
5 receiver simply operate the buildings and generate income while
6 we work through these issues?

7 MR. RACHLIS: I think, as your Honor probably heard
8 from some of the other hearings that we've had before you,
9 there are many properties involved here that don't have high
10 tenancy rates, that have other physical problems and issues
11 with them, that are not making enough money. And, of course,
12 your Honor knows from the rent segregation ruling, that has
13 impacted the ability to even deal further with those issues.

14 So the idea -- the fact is is that, many of those
15 properties need to be sold so that they can -- so that the --
16 any losses of the inability to have income from them can be --
17 can be capped. That, in essence -- there are other issues, of
18 course, too. I mean, a liquidation, going back sort of in
19 looking to this point, your Honor, of course, knows that the
20 job of the receiver is to have a liquidation plan and an
21 orderly process for the disposition of these assets.

22 THE COURT: But sometimes the receiver's job is also
23 to generate income, or at least continue the operation.

24 MR. RACHLIS: And that is, indeed, what has been
25 going on to this point. And we've been very much -- it has

1 been a struggle at times, as I think this court knows, and as
2 Judge Lee knows, too, in trying to address many of the issues
3 at 113 different properties. So the balance and the business
4 judgment that has been placed in the receiver by the court to
5 both monitor -- to monitor the business, operate the business,
6 and part of that includes disposition of assets for an orderly
7 process liquidation plan, set that forth. And we've been
8 trying to do that since that point in time and unfortunately
9 have run into delay after delay, which, unfortunately, is being
10 exhibited further here through this hearing today.

11 THE COURT: But why isn't it possible to sell those
12 properties that are not encumbered and continue to operate the
13 properties that are, in fact, encumbered?

14 MR. RACHLIS: Well, some of the ones we -- we have
15 been in the process of selling the unencumbered properties.

16 THE COURT: I'm sorry?

17 MR. RACHLIS: We have been selling the properties
18 that are unencumbered. We have been trying to -- also, we've
19 sold properties that have encumbrances on them too and have put
20 those monies in escrow. The problem, of course, relates to
21 what type -- what is the condition of the property; right? I
22 mean, at a certain point, is it generating enough income? What
23 is time of vacancies? What is the physical condition? How
24 much money is necessary in order to have that property be
25 something that can be used? Or is it better off sold and let

1 others go ahead and deal with those -- with those questions.
2 Of course, there other operational issues: Property taxes,
3 water -- water, utility bills. All of those types of things
4 that we have -- essentially have to take over. And some of
5 these things went back to 2017, when the Cohens were still
6 operating. There were debts and obligations that were being
7 incurred and remained on the books associated with some
8 properties with that.

9 The bottom line is, is that, many of these properties
10 have operational issues. And we are making every effort. And
11 the batches of properties here that are part of this sale, not
12 every single one, but most of them are precisely those type of
13 properties. And it is to the benefit of all of the victims of
14 the fraud to have those properties sold. And as the court is
15 aware, have the proceeds put in escrow. There is no harm in
16 that. There is no harm whatsoever because those properties are
17 placed in escrow pursuant to this court's order.

18 THE COURT: But what Mr. McClain is arguing, though,
19 Mr. McClain argues that the right to credit bid is elusory
20 because it's taking on way too much burden and risk. It does
21 not have to. But in order for the creditors to not have that
22 burden and the risk, it needs to know exactly what it is
23 entitled to.

24 So let me ask you to address Mr. McClain's argument
25 that, even though Motion No. 285, where the creditors are

1 asking for lien priority, Judge Lee denied that request, why it
2 can't be raised in this context. And Mr. McClain says, that's
3 not law of the case because the context is different.

4 MR. RACHLIS: It's not different. Look, at the
5 end -- we do have to look back in history here. I think your
6 Honor had it absolutely correct in terms of looking at the
7 record here. The record is is that these issues have been
8 raised both before your Honor and before Judge Lee in terms of
9 priority hearings, and things of that nature, and had been
10 rejected. Your Honor is correct that any such hearing would be
11 the same, no matter when it's held. Your Honor is further
12 correct, and the record will reflect, if you look at the --
13 your Honor didn't miss any -- any point of argument when
14 raised -- when those were raised in response to the second
15 motion for approval of the process for public sale of real
16 property by sealed bid, which is Document No. 228. There were
17 three filed objections. Not a single one of them raised any of
18 these issues, which your Honor correctly notes would
19 essentially upend and overturn all the other rulings that have
20 occurred to date.

21 And whether that is law of the case that requires it
22 or whether it's just good, old-fashioned estoppel, which it
23 should be in this point in time. They come into this
24 courtroom, they don't make any of those arguments. They say,
25 we just want a simple process where we can credit it. We want

1 to be able to bid, just like anybody else. They never advised
2 the receiver, they never advised the court of any of these
3 issues. And, now, having lost on all of those other arguments
4 before this court and Judge Lee on priority, and things of
5 that, they come again to take a second swipe. They don't come
6 really -- I mean, when you look at why we're here, we're here
7 to try to establish the rules under on the credit bid process;
8 right? That's what we're trying to do. And Liberty, to its
9 credit, despite, I think it's fair to say, that we have been
10 certainly not on the same footing. On a variety of issues,
11 they have been as a vociferous an objector as anybody here, we
12 were able to reach agreement on what those credit bid rules
13 could look like. That is not what they are arguing here. What
14 they're arguing about, again, is priority. That's the same
15 issue never raised on these motions and already previously
16 rejected. The court is absolutely right, there is no reason to
17 do that now.

18 MR. McCLAIN: Your Honor, if I may just correct
19 something for the record?

20 THE COURT: Hold on. Mr. Rachlis, are you done?

21 MR. RACHLIS: Yes, if I -- hopefully I've responded
22 to your question. I do want to do that.

23 THE COURT: Yes. Mr. Hanauer, do you have anything
24 to add?

25 MR. HANAUER: Just to directly respond to your

1 question, your Honor, about why is it necessary now that the
2 properties be sold. It's the SEC's understanding, after
3 conferring with the receiver, that the very properties he is
4 trying to sell right now are the money-losing properties. This
5 stems from the original -- the very first request of the
6 creditors that the rents need to be segregated. They got what
7 they want on that. That's created some issues that each of the
8 properties now needs to be siloed. And there are a decent
9 amount of properties that are just flat out losing money that
10 the receiver can't use any of the other properties to help.
11 Those are the properties that the receiver chose to sell now to
12 get those money-losing properties off his books now. He has
13 been trying to sell them, I think, since early this year. By
14 pushing this process back even further, which Judge Lee has
15 rejected, just means that those properties continue to lose
16 money ultimately to the detriment of the creditor pool as a
17 whole.

18 THE COURT: Why isn't it possible to simply shut it
19 down? If it's money-losing operation, shut it down until you
20 have its determination as to who should be taking over that
21 particular building.

22 MR. HANAUER: Because there are -- there are tenants
23 that live in these buildings. There are operations. As you've
24 heard, the city came in when we had another hearing saying, you
25 just can't leave it like this. Something has to be done.

1 There are crumbling porches, there are other things that are
2 going on. You cannot not pay attention to things. Shutting it
3 down is --

4 THE COURT: I'm just trying to get an understanding.

5 MR. HANAUER: Yeah.

6 THE COURT: When you shut it down, tenants have to
7 move out.

8 MR. HANAUER: Yes.

9 THE COURT: So why can't we do that? I'm just -- I'm
10 just curious.

11 MR. HANAUER: That will actually, then, get
12 potentially -- could devalue whatever property -- the value of
13 the property could be devalued. If you're going to kick
14 tenants out at that point in time, you then are going to hinder
15 potentially the ability and pricing of that property. There is
16 a balance here. And this does go directly to the business
17 judgment that has been lodged with the receiver in terms of
18 operating the Equitybuild receivership estate at this point in
19 time. And we have made every effort, including third-party
20 advisors, and things of that nature, to try and operate within
21 this context.

22 Your Honor, there is a legal justification here, too.
23 It's not just sort of a factual discussion. While it is
24 absolutely accurate that no Illinois law supports anything that
25 the creditors are advancing here --

1 MR. McCLAIN: That's not true.

2 MR. HANAUER: -- is actually -- if I could finish.

3 If you look at some of the law, including your Honor cited the
4 *Octagon* case in the May 2nd order and other orders like that,
5 other opinions like that, they go back to a Section 363(f) of
6 the bankruptcy code. And many plans refer to that point. And
7 courts, bankruptcy courts, have at least noted some of the
8 following, which I will set forth for your Honor, as further
9 evidence as to why the process today has been appropriate and
10 what the process here -- why the process here is appropriate.

11 It talks about the fact that 363(f) of the bankruptcy
12 code is a powerful tool, permitting, in that context, the
13 bankruptcy trustee to maximize the recovery from an asset
14 without being duly entangled in an early stage of the
15 proceeding and controversies concerning the existence, validity
16 and priority of liens and other interests in properties sought
17 to be sold. Instead, Section 363(f) allows a trustee to
18 quickly cut through the potential morass of such controversies,
19 promptly sell the property for the best price available and
20 hears all those controversies a later date.

21 That's precisely the process -- while it is
22 instructive here, the bankruptcy practice, that's precisely
23 what the courts have done to this point, and that's exactly
24 what we are trying to do. Sell those properties, segregate
25 them, as your Honor has ordered be done, and then we can limit

1 any -- any issues associated with those properties. And then
2 we can have the priority hearings down the road, as both your
3 court and Judge Lee has indicated would occur at a later point
4 in time.

5 MR. McCLAIN: Your Honor, may I respond?

6 THE COURT: Yes.

7 MR. McCLAIN: First, I just want to set the record
8 straight that the Motion 285 was actually filed before your
9 Honor, and your Honor entered a minute order on May 1st, that's
10 Docket 349, in which you indicated that you will not address
11 the issues in that motion.

12 Secondly, going back to what both the SEC and the
13 receiver have brought up is that they're trying to sell
14 properties that are losing money. Well, your Honor, if they
15 are losing money, they should be abandoned by the receiver
16 because the -- that is just a drain on the receivership estate.
17 So if one of these properties is underwater and it is fully
18 secured by one of the lender's liens, there is no benefit
19 that's going to go back to the estate. All the -- all the
20 benefit is going to the receiver by keeping those properties in
21 the receivership and racking up additional fees. No money will
22 go to the receivership estate after the sale. The only money
23 that will transfer is money to pay the closing costs. And then
24 the rest of the money will be segregated and held in escrow
25 pursuant to our security interest. So that just highlights the

1 fact of why we need to expedite this process.

2 And, additionally, when he talked about -- when the
3 receiver talked about that we're trying to upend the process,
4 your Honor, we are not trying to upend the process. This court
5 has already made it clear that we are entitled to credit bid.
6 All we are asking is that that credit bid procedure be
7 consistent and conform to Illinois law. And to do that, we
8 need two facts resolved: Amount owed and priority.

9 THE COURT: I get that. Let me ask you, you said
10 that the three -- March 13, 2019, Motion 285, was addressed to
11 me, and I entered the order on May 1.

12 MR. McCLAIN: Correct.

13 THE COURT: So I'm the only judge who addressed the
14 issue of lien priority?

15 MR. McCLAIN: I -- I don't recall if we raised it
16 before Judge Lee or not, your Honor.

17 THE COURT: Mr. Hanauer, you're shaking your head.

18 MR. HANAUER: Yes, that was absolutely raised in
19 front of Judge Lee when he heard the appeal of your orders
20 allowing the claims process to proceed. And he rejected the
21 arguments that a priority determination should come first, and
22 he ordered that the priority information should be part of a
23 claims process.

24 THE COURT: All right. So --

25 MR. McCLAIN: Again, your Honor, that's a separate

1 issue. What is before the court --

2 THE COURT: I understand. We don't have to cover
3 that ground again. I do want to give the others an opportunity
4 to say something in supplementing Mr. McClain's arguments.
5 Anyone?

6 MR. WELFORD: Your Honor, Jay Welford on behalf of
7 Liberty. I think, to put it in the clearest of terms, we have
8 two procedures, motions, that were filed. The first motion had
9 to do with the claims process. And the lender group said
10 before -- we don't want to wait until the claims are all in, we
11 should adjudicate priority now and set a schedule to do that.
12 That is what was denied. Then what occurred --

13 THE COURT: When?

14 MR. WELFORD: As part of -- I don't have all those
15 dates, but I'm just giving you the general overview of this.
16 As part of that motion, the ruling was made, we're not going to
17 adjudicate priority, and we're going to allow the claims
18 process to go forward. That was the first ruling.

19 The second thing that occurred is that we had the
20 sale procedures. When we got to the sale procedures, the
21 concept of the ability to credit bid came into the fold. And
22 as part of that, the determination was made that the -- both
23 the lenders, the traditional lenders, and even an Equitybuild
24 investor, should have the right to credit bid. They could be
25 first, we could be first, we don't know. But what occurred,

1 then, is, when you get to the concept of credit bid, under
2 Illinois law, when you determine how much to credit bid, you
3 first need to know the dollar amount. And, second, you need to
4 know the priority. And so that's where the conflict is. I
5 don't think these lenders are trying to re-tread. I think that
6 we now have a conceptual problem because we have a new ruling
7 that was not before the parties at the time --

8 THE COURT: So you agree with the argument
9 Mr. McClain made that if a property is losing money, it should
10 be abandoned. In other words, the tenants should be moved out
11 and close out the property and operation.

12 MR. McCLAIN: Your Honor, if I may just clarify, I
13 was not indicating that the tenants should be evicted or moved
14 out.

15 THE COURT: Well, how do you abandon a property
16 without taking the tenants out?

17 MR. McCLAIN: It is removed from the auspice of the
18 receivership estate. So the stay is lifted, and the lender,
19 who has a mortgage on the property, can then foreclose on the
20 property.

21 THE COURT: You mean take it out of the receiver's --
22 receivership assets?

23 MR. McCLAIN: Correct, your Honor. And the stay be
24 lifted until the property is no longer subject to the
25 receivership's jurisdiction. And then the lender can proceed

1 with foreclosure as it wishes, and then they enforce their
2 security interests through that.

3 THE COURT: And the other creditors are in agreement.

4 MR. HANAUER: And, your Honor, just --

5 THE COURT: Hold on. Just, for the record, it
6 appears that all creditors represented in court are in
7 agreement.

8 Yes?

9 MR. HANAUER: Your Honor, when we were in front of
10 Judge Lee, the creditors explicitly raised this abandon
11 argument and Judge Lee explicitly rejected it. And it's --
12 it's not -- and one of the reasons he did is because it's
13 just -- just because the property is not making money or is
14 underwater doesn't mean that there is -- there is not value in
15 it to either the investors or the secured lenders. Just
16 because the property is underwater, when the property is sold,
17 money is going to come back into the receivership. It may not
18 be at the full purchase price, or what have you, but a
19 significant amount of money will come in. It's that pot of
20 money that the investors and the creditors are going to fight
21 over. But as we explained to Judge Lee, and he agreed with,
22 simply because abandoning the properties would mean the
23 creditors are going to rush into Cook County court and the
24 investors won't be able to do anything.

25 THE COURT: Let me ask Mr. -- hold on. I do have

1 another hearing, so I want to ask Mr. McClain, was the
2 abandonment argument raised before?

3 MR. McCLAIN: Your Honor, yes, it has been raised
4 before, but in an entirely different context, as Mr. Welford
5 has pointed out. And --

6 THE COURT: Okay. Fine. Fine. I -- hold on. Hold
7 on. See, in terms of telling the creditors that the court will
8 not get involved in adjudicating priority, see, I -- I would
9 not have done that because that would not be within the scope
10 of my referral.

11 MR. McCLAIN: Your Honor, the minute order actually
12 states that the court will not address in this order the issues
13 not properly before the court and arguments having nothing to
14 do with the instant motion, namely assertions raised by certain
15 creditors in their response/cross motion 285.

16 So you did not outright deny it, you just indicated
17 that you were not going to assess it.

18 THE COURT: So Mr. Hanauer takes the position that
19 this issue was raised with Judge Lee and Judge Lee denied
20 that --

21 MR. McCLAIN: As Mr. Welford pointed out, it was in a
22 different context.

23 THE COURT: Okay.

24 MR. McCLAIN: What we're trying to sort out now is
25 the May 2nd order.

1 THE COURT: All right.

2 MR. McCLAIN: And, your Honor, if I may address one
3 thing that the SEC just brought up? It's an underwater
4 property. By definition, that means that there is more owed on
5 the property than the property is worth. So if, for instance,
6 the property is only worth a million dollars but you have a
7 \$2.5 million mortgage on the property, no money is going back
8 to the receivership estate. All the money is going to go
9 towards the secured interests in that property. There is no
10 money going back. That's why we're asking --

11 THE COURT: No, but that assumes that the creditor
12 has 100 percent interest and not the investors.

13 MR. McCLAIN: And that's precisely what we're trying
14 to sort out right now, your Honor, so that we can figure that
15 out. Because, at this point, no money is going back to the
16 estate. The receivership -- or the receiver has already
17 indicated he is willing to escrow the funds. This court has
18 ordered him to escrow the funds. So no money is effectively
19 going back to the receivership estate. So we're trying to just
20 catch this at a head before the receiver continues to rack up
21 additional fees.

22 MR. RACHLIS: Your Honor, may I make one other point?

23 THE COURT: Last point. Go ahead.

24 MR. RACHLIS: Your Honor, this argument has also been
25 raised before your Honor as well. That is precisely why the

1 question about who gets the keys; right? We were talking about
2 when something is, quote, abandoned, or things of that nature,
3 there is no -- there is a host of victims that would have the
4 same rights that the folks standing before you have. This --
5 in this context by escrowing the money, their rights are
6 protected. It is essentially the receiver's actions here are
7 designed, as I believe the courts are, and as stated in various
8 words today, to protect the interests of all of those possible
9 folks with a claim to those -- those proceeds from those
10 properties. That's why they're being segregated. That's why
11 they've been siloed, if you will. And that's precisely why the
12 orders have been as they've been. This argument has come up
13 from last November, when we first talked about sales -- when we
14 first talked about sales of properties, all the way to today.
15 It's the same issue that continues to be raised, and I believe
16 the same result is -- is warranted --

17 THE COURT: Thank you.

18 MR. RACHLIS: -- as both you and Judge Lee have
19 indicated.

20 THE COURT: I would like the receiver's office to
21 help us -- you don't have to file anything, just a phone call.
22 Just point me to the record where the request for adjudicating
23 priority was denied, where the abandonment argument was
24 addressed by Judge Lee. Those two things. That's all I want.
25 I just need some assistance with that so that we can quickly

1 get to this particular motion as -- motion.

2 All right. Thank you. Yes?

3 MR. HANAUER: Your Honor, one very important point on
4 an unrelated matter. This is for the evidentiary hearing next
5 week. I just thought, while we're in open court, defendant
6 Jerome Cohen filed another motion to continue the hearing. The
7 SEC objects to that motion. I'm about to be gone for the
8 holiday in an area where I can't work on the response, but it's
9 very critical for the court to know that for some time Jerome
10 Cohen and his wife have been out of the country in Israel. In
11 their many requests to continue the hearing --

12 THE COURT: I'm sorry, Mr. Hanauer, we're getting
13 into the merits of the motion.

14 MR. HANAUER: No. No, your Honor. Just -- a
15 response will not -- I will not be able to file.

16 THE COURT: Well, you filed one already.

17 MR. HANAUER: Right, but Jerome Cohen just filed
18 another.

19 THE COURT: I understand, but it's the same motion;
20 right?

21 MR. HANAUER: Well, Judge Lee denied his motion in
22 order that it be --

23 THE COURT: So I'll read your response to that
24 previous motion.

25 MR. HANAUER: But, your Honor, just a point, because

1 Jerome Cohen has never raised it. He is not in the country
2 right now, and neither is his wife. His wife did not show up
3 for her deposition last week. And in all the filings Jerome
4 Cohen has made to continue the hearing, I just want to make the
5 court aware that he has not apprised the court that he has
6 never been in the United States during all these times he has
7 attended or moved the hearing.

8 THE COURT: I see. I see.

9 MR. HANAUER: Thank you, your Honor.

10 THE COURT: Thank you.

11 MR. McCLAIN: Your Honor, may I just request that
12 whatever the receiver tenders to the court, that he provides a
13 copy to everyone, either it be filed on the docket or he just
14 give us a copy?

15 THE COURT: Well, you can call together, or at least
16 let them know what's been said.

17 MR. RACHLIS: We will do that your Honor, yes.

18 THE COURT: Okay. Thank you.

19 MR. McCLAIN: Thank you, your Honor.

20 MR. HANAUER: Thank you, your Honor.

21 (Which were all the proceedings heard.)
22
23
24
25

CERTIFICATE

I certify that the foregoing is a correct transcript from the digital recording of proceedings in the above-entitled matter to the best of my ability, given the limitations of using a digital-recording system.

/s/Sandra M. Mullin

August 8, 2019

Sandra M. Mullin
Official Court Reporter

Date